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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 429

BRIAN O. SPARKS, BRANT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSON, FRANK T. HOTOPH, JOHN J. TAYLOR, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 93) is reported at 184 F. 2d 66.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1950 (R. 102). A petition for rehearing, filed on August 29, 1950 (R. 138), was denied on September 6, 1950 (R. 141). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Although the petition (p. 2) seeks to raise several questions, we believe that the following question is dispositive of the case:

Whether the order of the Civil Aeronautics Board, approved by the President, allowing a transfer of a certificate for overseas air transportation and amending other such certificates, is an order subject to presidential review under Section 801 of the Civil Aeronautics Act and as such not subject to judicial review under Section 1006 of the Civil Aeronautics Act.

STATUTE INVOLVED

The pertinent portions of Sections 801 and 1006 of the Civil Aeronautics Act (52 Stat. 1014, 1024, 49 U. S. C. §§ 601, 646) provide:

> SEC. 801. The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions

thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. * * *

SEC. 1006.

(a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. * * *

STATEMENT

At the start of this proceeding there were three American-flag carriers certificated to engage in scheduled service from the United States via the North Atlantic route to Europe (R. 65): Pan American World Airways (PAA), American Overseas Airlines (AOA), and Trans-World Airways (TWA). The route pattern under which they operated had been adopted by the Civil Aeronautics Board in 1945, in a proceeding entitled the *North Atlantic Route Case,* 6 C. A. B. 319 (R. 32). Under that pattern the chief traffic points served in Europe were London, Frankfurt, Paris, and Rome; PAA and AOA both served London and Frankfurt while TWA alone served

Paris and Rome (R. 65–66). Shannon was a common gateway for all three carriers (R. 65–66).

In 1948, PAA and AOA entered into an agreement calling for the purchase by PAA of the properties of AOA and the transfer to PAA of AOA's certificate of public convenience and necessity (R. 77). PAA and AOA then applied to the Civil Aeronautics Board for approval of that agreement and the Board instituted this proceeding, denominated the *North Atlantic Route Case* (R. 159). The Board allowed numerous parties to intervene, including TWA and petitioners herein (R. 146). Petitioners intervened as representatives of some two hundred employees of AOA of whom a number were stockholders of that company (R. 20).

Concurrently, in response to motions by TWA and others, the Board instituted a proceeding under Section 401 (h) of the Act to determine whether the certificates of PAA, AOA, and TWA should be altered, amended or modified in whole or in part, limited to an examination of the routes of those carriers to determine adjustments that would be required in the public interest if the transfer of the assets and certificates of AOA to PAA were approved (R. 159–160). This proceeding was consolidated with the *North Atlantic Route Case* (R. 160).

Following full and lengthy hearings, in which petitioners and other interested parties participated, the Civil Aeronautics Board on June 1,

1950, transmitted to the President, pursuant to the provisions of Section 801 of the Act, its opinion and order disapproving the applications of PAA and AOA (R. 146). On June 29, 1950, the President approved and signed the order and returned it to the Board (R. 7). The order was not, however, published and, on the following day, June 30, the President verbally directed that the opinion and order be returned to him (R. 7). This was done, and, on the same date, the President caused his signature to be eradicated. Thereafter, the President requested and received the views of the members of the Board with respect to questions involved in the *North Atlantic Route Case* upon which he desired further advice (R. 96). Subsequently, on July 10, 1950, after receipt of such advice, the President directed the Board, by a letter of instructions, to issue an order approving the transfer of the assets and certificate of AOA to PAA and designating certain route changes in conjunction with the transfer (R. 147). Those changes, in summary, permitted TWA to fly to London and Frankfurt, and PAA to fly to Paris and Rome (R. 147). Pursuant to this directive, the Board on July 10 and 11, 1950, adopted and executed an order, opinion, and amended certificates for TWA and PAA in conformity with these instructions (R. 153). The Board's order specifically provided that it would retain jurisdiction of the proceeding "for the purpose of imposing such em-

ployee protective conditions as the Board may hereafter find to be appropriate and in the public interest," and directed further that persons employed by PAA and AOA should not be discharged "other than for good cause shown until further order of the Board." The documents evidencing the Board's actions were again transmitted to the President, who approved and signed them on July 11, and returned them to the Board (R. 155). It is this order of which petitioners seek review.

On July 21, 1950,[1] petitioners and TWA severally filed petitions in the United States Court of Appeals for the Second Circuit to review the Board's order and moved to stay the order pending the court's decision (R. 1, 94). PAA and AOA were permitted to intervene in petitioners' suit (R. 92, 93). Oral argument on both motions to stay was heard on July 26, 1950. At the argument, PAA and AOA moved to dismiss petitioners' suit both because the court lacked jurisdiction to review the order and because petitioners

[1] On July 12, 1950, an action for an injunction seeking to restrain the Board from issuing the Order of July 11, 1950, was brought by petitioners and Seaboard & Western Airlines, Inc., in the United States District Court for the District of Columbia (C. A. No. 2989–50). This action challenged the validity of the Order of July 11, 1950, upon substantially identical grounds as those asserted here. An *ex parte* temporary restraining order was issued on July 12, 1950. Following a hearing upon the Government's motion, it was dissolved on July 17, 1950. There have been no further proceedings in connection with this action.

were without standing to contest that order (R. 88, 91).

On August 14, 1950, the court of appeals dismissed both petitions for want of jurisdiction to review the orders (R. 102). Petitioners made timely application for a rehearing, contending not only that the court had erred in holding it lacked jurisdiction to review the order but also that the court had ignored certain of petitioners' arguments, presumably because the court had found petitioners without capacity to maintain the suit (R. 107). The petition for a rehearing was denied (R. 141).

ARGUMENT

1. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, held that orders of the Board which are subject to presidential approval under Section 801 of the Civil Aeronautics Act are not subject to judicial review under Section 1006 of that Act. "The President," said the Court, "both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret" (333 U. S. at p. 111).

The order of the Civil Aeronautics Board which petitioners would have this Court review was

prepared in response to the detailed instructions of the President and published only after his approval. There can be no doubt that the order was one for which the statute required presidential approval, and which, therefore, comes within the rule of the *Waterman* case. The order approved a transfer of AOA's certificate to PAA, and also amended the certificates of both PAA and TWA. Section 801 of the Act expressly requires presidential approval of a "transfer" and of an "amendment" of a certificate authorizing overseas air transportation.

Petitioners argue that the earlier proposed order disapproving the transfer did not require presidential approval and hence would have been judicially reviewable. Even if this argument were valid, we do not see how it could alter the conclusion that the order which actually became effective, and of which petitioners here complain, is not reviewable. In any event, however, we do not think the statute can be read as requiring adoption of a sort of inverse "negative order" doctrine. Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125. See also Section 1006 (a) of the Act, quoted *supra,* p. 3. As the court below rightly held, a fair reading of Section 801 in the light of the purpose of Congress, and especially in view of the rationale of the *Waterman* case, *supra,* compels the conclusion that the order denying the transfer was subject to presidential approval and was properly submitted to him by the Board.

The first sentence of Section 801 of the Civil Aeronautics Act subjects to presidential approval "the issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation." Petitioners urge that, because this list does not specifically include the denial of a transfer of a certificate, such a denial does not need the approval of the President.[2] Their position, we submit, rests on a "meticulously literal reading" of the statute (R. 99) which is contrary to the spirit of the decision of this Court in the *Waterman* case. As was pointed out by the court below, if a denial of a transfer is not subject to presidential approval, the same must be true of the denial of an amendment, cancellation, suspension or revocation of a certificate. But in all such

[2] Petitioners cite *Cordova Air Service, Acquisition by Alaska Air Lines*, 4 C. A. B. 708, in which the Board's denial of an application to acquire an air carrier and to transfer a certificate to engage in overseas air transportation was not submitted to the President, as establishing an administrative practice in this regard. There is nothing in the *Cordova* case to indicate a conscious refusal to submit the matter to the President rather than a mere inadvertent failure to do so. Moreover, the case is the only one of its kind and it was decided long before the *Waterman* case, which focused attention on this issue. In the present case, early in the proceeding, in its order establishing the scope of the issues, the Board plainly indicated that its order would be submitted to the President for his approval. Order Serial No. E–2833 (R. 158, 161).

cases, the same "delicate issues of foreign policy" (R. 100) which make it desirable for the President to review the grant of an application may be present in the event of its denial. The argument that the President is not interested in a denial of a transfer because it effects no change in the status quo would apply as well to a denial of original certification which is expressly made subject to his approval. The important factor in all these cases is not whether the decision effects a change but rather that the Board has made a policy decision in an area "for which the Chief Executive has special responsibility." "Such decisions," as this Court said in the *Waterman* case, "are delicate, complex, and involve large elements of prophecy" and are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." (333 U. S. at 111).

Furthermore, the restricted interpretation of the first sentence of Section 801 to exclude the denial of a transfer from the requirement of presidential approval would be inconsistent with the second sentence of that section. By the second sentence Congress required that "copies of all applications in respect of such certificates * * * shall be transmitted to the President" and that "all decisions thereon by the Civil Aeronautics Board shall be submitted to the Presi-

dent before publication thereof." It is not reasonable to suppose that Congress would require the Board to submit to the President copies of all applications and their decisions thereon unless those decisions were intended to be subject to presidential approval.

The proceeding before the Board in this case was an extremely important one. The decision denying the transfer established, as effectively as the grant or denial of certification, the pattern, at least for the next few years, of American-flag air operation in the North Atlantic area. That decision was precisely of the sort which this Court, in the *Waterman* case, held Congress intended the President to make. Unless this Court wishes to depart from the rationale of the *Waterman* case, no useful purpose would be served by granting the petition.

2. As stated above, we believe that the question whether the order was subject to judicial review is dispositive of this case and was correctly answered by the court below. Petitioners, however, raise several other contentions, all of which, we feel, are without merit. They are dealt with, briefly, below.

(a) Petitioners contend that, even if the denial of a transfer is subject to presidential approval under Section 801, the President could not condition his approval of the transfer on the adjustment of the routes of the remaining carriers

because the question of changes in routes had not been considered by the Board. Their contention is not in accord with the facts.

The proceeding before the Board was not limited solely to the question of granting or denying the transfer but was expressly broadened, over the objection of the parties to the transfer (R. 159), to include consideration of adjustments in route patterns which might be necessary in the event the transfer was granted (R. 155, 158). The Board felt that "the determination of whether it would be in the public interest to have two rather than three American-flag carriers certificated in the North Atlantic area could not intelligently be made unless [they] could also indicate the route pattern of the two carriers, as [they] had the route pattern of the three existing carriers in 1945" (R. 161). At the hearing on the merits testimony was heard and exhibits introduced relating to possible route adustments (R. 40, 41). Moreover, one member of the Board, Mr. Lee, dissenting from the Board's denial of the transfer, said that he would grant the transfer provided appropriate adjustments in the routes were made. Mr. Lee's opinion coincided most nearly with that of the President.

(b) Equally without substance is petitioners' assertion that the decision below conflicts with that of the Court of Appeals for the District of Columbia Circuit in *Seaboard & Western Airlines* v.

Civil Aeronautics Board, 181 F. 2d 777.[3] The court in the *Seaboard* case simply held that it was not unreasonable for the Board in the instant proceeding to consider the question of adjustments in routes necessary in the event of approval of the transfer without entering upon consideration of the whole problem of North Atlantic routes. There is nothing inconsistent with that opinion in the decision of the court below.

(c) Petitioners also contend that the court below erred in failing to hold that there was no requirement of presidential approval at least as to that portion of the Board's order relating to PAA's acquisition of the assets of AOA. Their argument, in effect, is that although two aspects of the Board's order—that allowing the transfer of AOA's certificate and that amending PAA's and TWA's certificates—are not judicially reviewable, this third aspect of the order is reviewable. The opinion of the court below provides a complete answer to this contention:

> It may be that Board action on an acquisition of assets under section 408, 49 U. S. C. A. § 488, not involving the transfer of

[3] Prior to the institution of the proceeding involved here Seaboard Airlines had applied for certification to transport property only to certain points in Europe. When the instant proceeding commenced Seaboard moved the Board to consolidate its application in the hearing. The Board refused on the ground that it did not desire to open up the entire question of North Atlantic routes. Seaboard appealed from that denial to the Court of Appeals for the District of Columbia Circuit.

> a certificate, is judicially reviewable under section 1006 (a), 49 U. S. C. A. § 646 (a). But where, as in the present case, the acquisition of assets and the transfer or amendment of a certificate are inextricably mingled in the same proceeding, we think that the Congressional purpose to grant the President discretion as to overseas air transportation would be thwarted to permit judicial review of that portion of the order relating to acquisition of assets. No authority to the contrary has been brought to our attention. [R. 100–101.]

(d) Petitioners' final contention is that the order of July 10 was never "adopted" in that the Board members simply initialed the order individually before submitting it to the President for his approval. This, say petitioners, was not Board action. We submit that this contention is groundless and that there was "Board action" regardless of the mechanics of adoption by the Board. The order involved was prepared in response to the instruction of the President after his disapproval of the earlier order refusing the transfer (R. 147). On July 10, the Board met and directed that an order be prepared in accordance with the President's instructions (R. 139). The order was so prepared, initialed by the members and approved by the President (R. 139). Had no further action been taken prior to publication there would still be no reason for finding that the order had not been adopted. The Board,

as a Board, knew what the terms of the order were to be; sitting as a Board the members directed that it be prepared; after preparation they individually approved the order and presumably detected no departure from their directions. In any event, there was subsequent Board action with respect to the order: On July 14, 1950, TWA requested that the Board stay issuance of its order and reopen the proceedings (R. 165). The Board denied this request on the ground that "publication of its opinion and order dated July 10, 1950, is conducive to the proper dispatch of its business" (R. 166). Whatever defect there may have been in the original adoption was certainly cured by this action.

3. The court below based its dismissal of petitioners' suit on lack of jurisdiction to review the Board's order and did not pass on the question of petitioners' standing to challenge that order. Petitioners, however, seem to feel that the court tacitly ruled against them on the question of their capacity and consequently ignored certain of their contentions. We do not believe that there is any basis for supposing that petitioners' contentions received less consideration than they warranted. We do believe, however, that the court could properly have dismissed petitioners as being without standing to challenge the order.

Petitioners represent some two hundred employees of AOA, a number of whom are stockholders of that company (R. 20). As such they

were properly permitted to intervene in the proceeding before the Board (R. 146). Their capacity to contest the Board's order must, however, be measured by the standard of Section 1006 (a) of the Act which provides that review may be sought, in a proper case, by any person "disclosing a substantial interest" in the order. It is submitted that petitioners have not disclosed such interest, even if "substantial interest" requires no more than that a person be "adversely affected." Cf. *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F. 2d 810 (C. A. 2).

The Board's order specifically protected petitioners, as employees, from injury as a result of the transfer:

> It is ordered: * * *
>
> 5. That this proceeding be held open and jurisdiction be retained for the purpose of imposing such employee protective conditions as the Board may hereafter find to be appropriate and in the public interest;
>
> 6. That no person employed by Pan American World Airways, Inc., or American Overseas Airlines, Inc., upon the effective date of this order in their North Atlantic operations shall be discharged other than for good cause shown until further order of the board herein; * * *. [Order, Serial No. 4410, R. 154, 155.][4]

[4] See Secs. 401 (i), 408 (b), 49 U. S. C. 481 (i), 488 (b); *cf. United States* v. *Lowden,* 308 U. S. 225.

Nor do petitioners show that any interest as stockholders in AOA is threatened by the transfer. Instead they frankly admit that their chief interest in the case is to protect the public interest (Petition, p. 6). *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, and *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, on which petitioners rely, went no further than to permit judicial review at the instance of persons establishing that their interests were adversely affected. Petitioners have not shown any such interest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Petitioners,

vs.

CIVIL AERONAUTICS BOARD,
Respondent,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,
Interveners.

BRIEF OF PAN AMERICAN WORLD AIRWAYS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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